

February 26, 1996
REPORT TO THE HONORABLE MAYOR
AND CITY COUNCIL

PROPOSED ORDINANCE BARRING ISSUANCE OF
LAND USE PERMITS TO PERSONS WHO HAVE
VIOLATED CAMPAIGN MONEY LAUNDERING LAWS

INTRODUCTION

Based on a proposal by the Mayor, the Rules Committee directed the City Attorney to draft amendments to the San Diego Municipal Code that would bar issuance of land use permits to companies who had reimbursed individuals for having made campaign contributions in a City candidate election. In response, the City Attorney has prepared a draft ordinance, which is attached to this report. This report briefly explains the draft ordinance, outlines policy and legal issues presented by the ordinance, and addresses legal questions posed by the Mayor in her original proposal.

This is the second ordinance and second report arising out of the Rules Committee's request. In addition, the City Attorney has prepared an ordinance amending the San Diego Municipal Code that would bar a company from contracting with the City if that company had "laundered" campaign funds. The City Attorney has also issued a report accompanying that ordinance. That other ordinance and report have been sent to you separately.

BACKGROUND

The background information for this ordinance and report is the same as that for the contract debarment ordinance and accompanying City Attorney's report. In lieu of repeating that same information, we refer you to that other City Attorney report.

ANALYSIS

For purposes of this report, first, we briefly describe the ordinance; next, we discuss the policy and legal issues raised by the ordinance; last, we address the legal issues raised in the Mayor's memorandum.

I. DESCRIPTION OF DRAFT ORDINANCE BARRING
ISSUANCE OF LAND USE PERMITS

In contrast with the draft contract debarment ordinance, we found

no existing law which we could use as a model for this ordinance. Therefore, based on our understanding of the background and the brief direction we received from the Rules Committee, we created an ordinance that seemed to further the Committee's goals. In the interest of uniformity and consistency, and to the extent possible and practical, for purposes of this ordinance we have retained the structure and key features of the proposed contract debarment ordinance sent to you under separate cover. Specific provisions are described briefly below.

Section 111.0107 contains amendments to an existing Municipal Code section and adds definitions applicable to this ordinance.

Section 111.0110 contains a statement of purpose. It declares the purpose of the ordinance is to avoid actual, or the appearance of, undue influence in the land development process. It further declares that the purpose is not to punish someone for violation of a law. This statement of purpose has legal significance.

Section 111.0111 requires the applicable City decision-maker to deny an Applicant's request for a "permit, map, or other matter" upon certain conditions.F

The phrase "permit, map or other matter" is a term of art already used in the Municipal Code to describe several different types of land permits. Rather than create a new phrase and a new definition, we use the existing phrase and definition to describe generally the types of use permits that would be subject to this ordinance.

The specific types of "permits, maps and other matters" affected by this ordinance are listed in Section 111.0111(b). Conditions triggering required denial of permits are set forth in Section 111.0111 (a)(1) and (2) and include either a conviction in a court of law or a Fair Political Practices Commission ("FPPC") enforcement order finding that the applicant, or an affiliate of the applicant, has violated the state's campaign money laundering law in connection with a City election.

Section 111.0112 states generally that names of persons who have been denied permits under authority of this ordinance are to be placed on a list maintained by the City Manager. It makes clear that different divisions---called organizational elements in the ordinance---of an applicant-company will be subject to this ordinance, and that denial of permits may extend to affiliates of an applicant under certain conditions.

Section 111.0113 requires the City Manager to compile and maintain a current list of all persons whose permits, maps or other matters are required to be denied under this ordinance. It requires the Manager to establish procedures to ensure that the City does not mistakenly issue permits, maps or other matters to anyone on the list.

Section 111.0114 provides a standard and procedure by which certain high level employees and officers of a company and certain affiliates of

the company may themselves be subject to denial of land development permits or maps.

II. POLICY AND LEGAL ISSUES RAISED BY DRAFT ORDINANCE BARRING ISSUANCE OF LAND DEVELOPMENT PERMITS

A. Policy Issues

This ordinance raises the same key policy issues that are raised by the contract debarment ordinance, namely: (1) whether the decision to bar issuance of permits should be mandatory or discretionary; (2) over what duration of time will denial of permits be effective; (3) who shall be subject to denial of permits (companies, individuals or others); and, (4) what shall be the effective date for commencement of denial of permits. The policy issues are discussed in depth in the report accompanying the contract debarment ordinance. That discussion will not be repeated here.

B. Legal Issues

This draft ordinance raises substantially the same key legal issues as does the draft contract debarment ordinance, namely: (1) what is the effect of the purpose of the ordinance on its validity; (2) what due process rights, if any, must be afforded a land development permit applicant; and, (3) whether the ordinance is preempted by state law. These three legal issues were discussed at length in the City Attorney's report accompanying the draft contract debarment ordinance. The same principles apply to this ordinance and, therefore, that discussion will not be repeated here.

In addition, because this ordinance affects land development permits, maps and similar matters, the ordinance raises a question about the effect its enforcement may have on an applicant's "vested" rights. If someone "has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government," that person "acquires a vested right to complete construction in accordance with the terms of the permit." *Avco Community Developers, Inc. v. South Coast Regional Com.*, 17 Cal. 3d 785, 791 (1976) (emphasis added). To the extent an applicant has a vested right to a particular land development permit, even though the applicant has been convicted of a campaign money laundering violation in relation to a City election, the ordinance may not be enforceable against that applicant. Furthermore, an attempt to enforce the ordinance against someone with "vested rights" may subject the City to civil liability, including damages. Whether a person or entity has a vested right to a permit is a case-by-case determination. Such issues may be addressed by the Council and City Attorney as they arise in a particular case.

RESPONSES TO LEGAL ISSUES RAISED IN MAYOR'S MEMORANDUM

In her memorandum, the Mayor also asked the City Attorney to address several questions pertaining to barring issuance of land development permits for violation of campaign money laundering laws:

Question A: May a company be barred for a period of two (or three) years from having its discretionary land development permits processed by the City, if it has been convicted of violating the state's campaign money laundering laws?

Answer to Question A: Probably yes, if the company's vested rights are not adversely affected and if legal issues such as constitutional due process requirements, preemption, and the ordinance's purpose are properly addressed. Although there are yet unresolved questions pertaining to preemption and effects on vested rights, we believe the City Attorney's proposed draft ordinance submitted with this report adequately addresses the legal questions.

Question B: May the City hold a company's application for discretionary land development permits in abeyance, that is, in suspension, if that company has been convicted of violating the state's campaign money laundering laws?

Answer to Question B: Holding a company's application for land development permits in abeyance (suspension) for anything but very short time periods would pose substantially the same legal issues as outright barring the company from obtaining those permits. See *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268, 1270-71 (D.C. Cir. 1972).

Question C: May the Council prevent the Planning Commission from reviewing (and granting) an application for discretionary land development of a person or company convicted of violating the state's campaign money laundering laws?

Answer to Question C: Yes, to the same extent as the City Council may itself refuse to review and grant discretionary land development permits it may prevent the Planning Commission from reviewing (and granting) land development permits.

Question D: What legal issues are raised by choosing the date of the illegal contribution versus the date of determination of an illegal contribution as the starting date for the ban?

Answer to Question D: The City may not learn of a company or person's conviction for violating state campaign money laundering laws until months, or even years, after the actual violation occurred. Therefore, a ban that becomes effective on the date of the actual violation, as opposed to the date of conviction of the violation, may never become effective at all.

For a ban to be effective the full length of time the Council desires will require that the ban become effective only on the date of the City's discovery of the conviction of the violation.

Respectfully submitted,

JOHN W. WITT
City Attorney

CCM:jrl:011(043.1)
Attachment
RC-96-8